

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Scott D. Dalesandro,)	
<u>et al.</u> ,)	
)	
Plaintiffs,)	Case No. 1:01-CV-109
)	
vs.)	
)	
International Paper)	
Company,)	
)	
Defendant.)	

O R D E R

This matter is before the Court on Plaintiffs' motion for attorney's fees, expenses, interest, and incentive awards (Doc. No. 45) and supplemental motion for attorney's fees and expenses (Doc. No. 67).

This case is an ERISA class action in which the Plaintiffs claimed benefits pursuant to a severance benefits plan under the Champion International Paper Corporation Reorganization Policy #828. Plaintiffs are a class of former employees of International Paper Company who accepted employment with Smart Paper, LLC when Smart Paper purchased the Hamilton B Street Mill from International Paper. International Paper denied Plaintiffs' claims for benefits on the grounds that, because they had received offers of employment from Smart Paper, Plaintiffs had not suffered an adverse employment action and, therefore, were not entitled to receive severance benefits. On review of the

plan administrator's decision, the Court determined that the plan administrator's decision was arbitrary and capricious because he made eligibility for benefits contingent upon his own definition of "employment action" when the plan provided that benefits were payable upon "termination," a term that was clearly defined by the plan and which obviously encompassed the termination of Plaintiffs' employment from International Paper. The Court, therefore, ruled that Plaintiffs were entitled to receive severance benefits under the terms of the plan. In the same order, the Court certified a class of similarly-situated former employees who are eligible to receive severance benefits under the plan.

The foregoing is but a thumbnail sketch of the procedural history of this case. There are other procedural and substantive events of consequence relevant in this case. The Court, however, will reserve description of those events until they become relevant to the analysis of Plaintiffs' claims for fees, expenses, interest, and incentive awards. Pursuant to 28 U.S.C. § 1132(g),¹ Plaintiffs seek attorney's fees of \$902,481.38

¹ Section 1132(g) provides:

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

and costs of \$12,874.79. Plaintiffs also move for an award of prejudgment interest and named Plaintiffs Scott Dalesandro and Diane Noonan each seek an incentive award of \$10,000.

Plaintiffs' claim for attorney fees represents 2,116.90 claimed hours by six attorneys and one paralegal at various rates, totaling \$601,654.25, enhanced by a multiplier of 1.5.

In its brief, International Paper suggests that an award of attorney's fees against it is not warranted, but, if the Court does decide to award attorney's fees, International Paper lodges a number of objections against the fees claimed by Plaintiffs. Specifically, International Paper objects to hours spent during the administrative process and objects to billings for alleged duplicative work. International Paper also objects to counsels' hourly rates as being excessive for this venue and to counsels' billing increments. International Paper claims that counsel's fees are excessive for the work performed.

International Paper contends that counsel's billing records are too vague, that Plaintiffs should not be compensated for pursuing unnecessary discovery disputes, and that the fees claimed for preparing the fee petition are excessive. International Paper also objects to the claim for a fee multiplier and opposes Plaintiffs' claim for expenses. International Paper argues that the Court should not give incentive awards to the named Plaintiffs. In fact, it is fair to say that International Paper

opposes almost every aspect of Plaintiffs' fee application. International Paper suggests that a more appropriate fee award would be in the neighborhood of \$194,000.

While the Court does not agree with all of International Paper's arguments, the Court does find that Plaintiffs' claim for fees should be reduced. The Court takes up the issues presented essentially seriatim.

A. Whether Attorney's Fees Should Be Awarded

The district court has discretion in deciding whether to award attorney's fees to a prevailing plaintiff in an ERISA case. Armistead v. Vernitron Corp., 944 F.2d 1287, 1301 (6th Cir. 1991). In determining whether to award attorney's fees, the trial court is required to consider the following factors: 1) the degree of the opposing party's culpability or bad faith; 2) the opposing party's ability to satisfy an award of attorney's fees; 3) the deterrent effect of an award on other persons under similar circumstances; 4) whether the party requesting fees sought to confer a benefit on all participants and beneficiaries of an ERISA plan or resolve significant legal questions regarding ERISA; and 5) the relative merits of the party's positions. Id.

At the outset, the Court notes that International Paper concedes the second and fourth elements, that is, it has the financial ability to satisfy a reasonable award of attorney's fees and that Plaintiffs sought to confer a benefit on many of

the plan's participants. See Doc. No. 49, at 3 n.1. The Court finds that the remaining factors weigh in Plaintiffs' favor as well.

Regarding the opposing party's bad faith or culpability, the Court observes that Plaintiffs prevailed in this matter under the arbitrary and capricious standard, which is the least demanding form of judicial review. The Court is cognizant that an arbitrary and capricious denial of benefits does not necessarily indicate culpability or bad faith. See Heffernan v. Unum Life Ins. Co. of Am., 101 Fed. Appx. 99, 109 (6th Cir. 2004); but see Gatlin v. National Healthcare Corp., 16 Fed. Appx. 283, 290 (6th Cir. 2001) (culpability requirement satisfied where plan administrator's decision was arbitrary and capricious). Nevertheless, even if prevailing under the arbitrary and capricious standard does not automatically satisfy the first element, the Court finds that it is satisfied in this case. In reaching this conclusion, the Court notes that in rendering his decision, the plan administrator ignored the plain language of the plan which favored Plaintiffs and imported his own terms and definitions in order to deny Plaintiffs' claims for benefits. Thus, International Paper was plainly culpable in this case.

Moreover, the plan administrator's interpretation of the plan is suggestive of bad faith. As indicated above, despite clear language to the contrary, the plan administrator

interpreted the plan to deny benefits to employees who received job offers from Smart Paper. If this were a good faith interpretation of the plan, then one must question why the plan was amended to delete language which clearly and specifically excluded employees who received subsequent offers of employment from the purchaser of the Mill from coverage. See Doc. No. 40, (Court's order ruling on motions for judgment on the administrative record), at 16.² The plan amendment coupled with the plan administrator's unsupportable decision gives credence to Plaintiffs' theory that International Paper amended the plan in order to retain its workforce so that it could sell the Mill as a going concern and then reneged on its obligations under the amended plan because of the expense. See Doc. No. 29, at vii-viii. Therefore, this factor favors Plaintiffs.

The above analysis indicates that International Paper's position on the proper interpretation was relatively weak and that Plaintiffs' position was relatively strong. Thus, the last factor favors Plaintiffs.

² In that order the Court stated:

The Court notes that a earlier severance plan adopted by Champion contained a provision which specifically made employees who were hired by the purchaser ineligible for severance benefits. See Doc. No. 29, Ex. 14, § 1.8(a) ("Excluded Employee is an employee who . . . is offered employment by the Purchaser."

Finally, with regard to the third factor, an award of attorney's fees against International Paper would serve as a warning to employers not to use their employees and their employees' benefits as pawns in their corporate maneuverings. ERISA was enacted to prevent employers from circumventing their obligations and frustrating employees' expectations regarding their promised benefits. Becker v. Mack Trucks, Inc., 281 F.3d 372, 381 (3rd Cir. 2002). An award of attorney's fees in this case would remind other employers that they are not to trifle with their employees' benefits.

In summary, the Court finds that all of the factors favor awarding Plaintiffs their reasonable attorney's fees in this case.

B. The Fees Claimed

Plaintiffs' claim for attorney's fees and expenses is summarized as follows:

<u>Attorney</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Theresa Groh	1,260.05	\$325/hr	\$409,516.25
John C. Murdock	451.55	\$300/hr	\$135,465.00
Myron A. Wolf	75.25	\$275/hr	\$ 20,693.75
Jeffrey S. Goldenberg	17.7	\$275/hr	\$ 4,867.50
Todd B. Naylor	21.3	\$200/hr	\$ 4,260.00
V. Brandon McGrath	32.5	\$150/hr	\$ 4,875.00
<u>Paralegal</u>			

Stephanie Vaaler	258.55	\$ 85/hr	\$ 21,976.75
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Total Hours & Fees	2,116.90		\$601,654.25
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Doc. No. 67. Ex. 1-A.

In addition, as mentioned, Plaintiffs seek to multiply the base fee by 1.5 as a reward for the quality of service and for obtaining exceptional success. Plaintiffs also appear to suggest that a multiplier would be appropriate because of their contingent fee arrangement. However, in City of Burlington v. Dague, 505 U.S. 557 (1992), the Supreme Court held that where a federal fee shifting statute is applicable, as is the case here, the trial court may not employ a multiplier to compensate for contingent fee arrangements. Id. at 567. Therefore, counsels' contingent fee arrangement is not a proper basis for increasing the fees above the lodestar with a multiplier. Plaintiffs' claim for a 1.5 multiplier would have brought their application for attorney's fees up to \$902,481.38.

B. The Hours Billed and Defendant's Objections

The lodestar amount, i.e., the reasonable hours expended times a reasonable hourly rate, is presumptively a reasonable award of attorney's fees for the prevailing party. Building Serv. Local 47 v. Grandview Raceway, 46 F.3d 1392, 1401 (6th Cir. 1995). The Court should not, however, award the plaintiff attorney's fees for duplicative or excessive hours. Cf. Wayne v. Village of Sebring, 36 F.3d 517, 532-33 (6th Cir. 1994).

The Court will begin its analysis of the hours expended with an obvious problem. International Paper argues, and the Court agrees, that the time spent and billed by Plaintiffs' counsel in preparing the fee application was excessive. By the Court's calculation, Ms. Groh's appears to have spent 228.60 hours on this task.³ Mr. Murdock has billed 24.70 hours for the fee petition.⁴ Mr. Naylor spent 13.3 hours on fee-related issues.⁵ Paralegal Stephanie Vaaler apparently devoted 42.20 hours to fee petition.⁶ The Court notes that some of both Ms.

³ As indicated by the following entries with the hours in parentheses: June 30, 2003 (.50), July 9, 2003 (9), July 10, 2003 (10), July 11, 2003 (10), July 14, 2003 (11.5), July 15, 2003 (12), July 21, 2003 (13), July 22, 2003 (1), July 24, 2003 (8), July 25, 2003 (10), July 30, 2003 (9), July 31, 2003 (11.5), August 1, 2003 (2.30), August 2, 2003 (1.80), August 3, 2003 (2.50), August 4, 2003 (3.80), August 5, 2003 (1.30), August 6, 2003 (2.50), August 7, 2003 (3.30), August 8, 2003 (5.20), August 11, 2003 (.80), September 17, 2003 (3.50), September 18, 2003 (6.20), September 22, 2003 (5.80), October 9, 2003 (1), October 10, 2003 (3.70), October 13, 2003 (9.80), October 14, 2003 (.70), October 16, 2003 (6.20), October 17, 2003 (5.50), October 20, 2003 (11.50), October 21, 2003 (8.20), August 3, 2004 (1.80), August 4, 2004 (2.70), August 10, 2004 (8.50), August 11, 2004 (6.80), August 12, 2004 (4.20), August 13, 2004 (3.70), August 16, 2004 (2.50), August 17, 2004 (2.80), and August 18, 2004 (4.30).

⁴ As indicated by the following entries with the hours in parentheses: August 4, 2003 (.30), August 7, 2003 (.80), September 17, 2003 (.80), September 22, 2003 (3.25), October 9, 2003 (1.00), October 20, 2003 (9.50), October 21, 2003 (7.25), and August 13, 2004 (1.80).

⁵ As indicated by the following entries with the hours in parentheses: April 23, 2003 (8) and October 16, 2003 (5.30).

⁶ As indicated by the following entries with the hours in parentheses: June 30, 2003 (3.50), July 1, 2003 (5.75), July 2, 2003 (6.00), July 3, 2003 (6.00), July 7, 2003 (6.25), August 11, 2003 (1.50), October 14, 2003 (3.30), October 16, 2003 (2.70),

Groh's and Ms. Vaaler's billings for preparing the fee application are included with billings for other tasks. For example, on October 13, 2003 Ms. Groh billed a block of 9.80 hours with the description:

Review letters from class members objecting to Defendants' calculation of benefits; conference with SAV re: same; review and research Defendants' Opposition to Attorney's Fees Motion; outline and draft Reply; phone conference with defense counsel McElligott re: employees' objections to Defendants' calculations of benefits; phone conference with James Hillmann re: customary copy charges; draft Hillmann Affidavit.

See Doc. No. 67, Ex. 1-A, at 5. The Court has no way to discern from this description how many hours Ms. Groh spent on the motion for fees. Similar entries are logged on July 9, 2003, July 21, See id.; Doc. No. 45, Ex. 1. Ms. Vaaler also has a vague or unspecific entry for fees on October 16, 2003. The Court may deduct a reasonable amount of hours if the attorney fails to account adequately for large blocks of time. Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1250 (10th Cir. 1998). Given, however, that Ms. Groh spent parts of forty-one different days working on the fee application, it seems safe to assume that the bulk of the blocked time was also spent on fees. The Court, therefore, assumes that 90%, or 205.74, of the 228.60 hours was actually spent by Ms. Groh on the fee application. Ms. Vaaler's vague time entry, which was only for 2.70 hours, is rather de

October 20, 2003 (3.00), and October 21, 2003 (4.20).

minimis. Therefore, the Court will assume that all of that time was spent on fee related issues.

Using the figures above, counsel expended 285.94 hours, or 13.50% of the time billed, preparing and defending their fee petition. In Coulter v. State of Tenn., 805 F.2d 146 (6th Cir. 1986), the Court held that hours spent preparing and litigating the attorney fee case should not exceed 3% of the fees allowed in the underlying case where the issue is submitted on papers without a trial. Id. at 151. The Court will, therefore, at this time deduct 285.94 hours from the base hours claimed of 2,116.90, and then add back 3% of the final hours allowed for litigating the fee application after further remaining adjustments are made. Thus far, the subtotal of hours allowed is 1,830.96.

International Paper also argues that Plaintiffs should not be compensated for time expended in an unsuccessful attempt to recoup payment for accrued but unused vacation time. The Court agrees. Normally, in assessing fees, the trial court will judge the plaintiff's degree of success as a whole rather than parsing the case into successful and unsuccessful claims. Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). The exception is where the plaintiff asserts distinct claims for relief based on different facts and legal theories. Id. at 434. In such a case, the trial court may judge success on a claim-by-claim basis and adjust the fee accordingly. Id.

Plaintiffs' claim for payment for accrued but not used vacation time, while perhaps not technically a distinct claim for relief, was obviously an afterthought injected into the case after some of the class members objected to their benefits calculations. See Doc. No. 63 (Court's order holding that Plaintiffs failed to properly assert claims for vacation pay). The vacation pay issue was a separate and distinct phase of the litigation in which Plaintiffs clearly did not prevail. Therefore, the Court concurs with International Paper that Plaintiffs should not be compensated for hours expended in their late-breaking and unfruitful attempt to recover vacation pay in this case. By the Court's calculation, Ms. Groh expended 98.48 hours on this issue,⁷ Mr. Murdock spent 12.50 hours on this

⁷ As indicated by the following entries with the hours expended in parentheses: October 13, 2003 (.98), October 27, 2003 (3.80), October 28, 2003 (7.80), October 29, 2003 (9.20), October 31, 2003 (1.70), November 10, 2003 (8.00), November 11, 2003 (6.70), November 12, 2003 (4.50), November 14, 2003 (.50), November 17, 2003 (1.80), November 18, 2003 (.80), November 19, 2003 (1.20), November 21, 2003 (1.20), December 1, 2003 (1.30), December 2, 2003 (6.50), December 3, 2003 (3.50), December 8, 2003 (2.00), December 9, 2003 (3.80), December 10, 2003 (1.00), December 11, 2003 (1.50), December 12, 2003 (4.20), December 15, 2003 (2.70), December 16, 2003 (3.70), December 17, 2003 (4.20), December 18, 2003 (3.30), December 22, 2003 (.70), December 23, 2003 (.50), January 9, 2004 (.70), January 14, 2004 (2.50), February 10, 2004 (2.00), February 17, 2004 (1.50), February 18, 2004 (2.80), March 1, 2004 (1.50), March 2, 2004 (.80), and March 5, 2004 (.50). With regard to the October 13, 2003 time entry, the Court has already deducted 90% of that entry because of vagueness of the entry on time spent preparing the fee application. In order to avoid double-counting, the Court only deducted the remaining 10%, or .98 hours, for time spent on the vacation pay issue.

issue,⁸ and Ms. Vaaler spent 60.4 hours on this issue.⁹ The Court, therefore, will deduct an additional 171.38 hours from the hours billed. The subtotal of allowed hours thus far is 1,659.58.

The next point of contention is whether Plaintiffs should receive attorney's fees for time spent during the administrative process, which in this case, also includes time spent litigating International Paper's motion to stay and whether Plaintiffs would be required to exhaust the available administrative remedies. International Paper argues that Plaintiffs should not receive attorney's fees for exhausting the administrative process. Plaintiffs argue that they should be compensated because the fees were incurred at International Paper's insistence (in other words, International Paper could

⁸ As indicated by the following entries with the hours expended in parentheses: October 27, 2003 (3.50), October 28, 2003 (2.90), October 29, 2003 (2.70), November 1, 2003 (.70), November 10, 2003 (.30), November 11, 2003 (.50), November 12, 2003 (.30), November 14, 2003 (.20), November 17, 2003 (.50), November 18, 2003 (.20), and November 19, 2003 (.70).

⁹ As indicated by the following entries with the hours expended in parentheses: October 13, 2003 (.20), October 15, 2003 (3.80), October 29, 2003 (2.00), November 6, 2003 (4.00), November 7, 2003 (5.50), November 10, 2003 (5.80), November 11, 2003 (4.00), November 12, 2003 (.50), November 17, 2003 (.50), November 18, 2003 (3.00), November 19, 2003 (.90), December 1, 2003 (.70), December 2, 2003 (4.30), December 11, 2003 (1.80), December 12, 2003 (1.00), December 18, 2003 (1.70), December 19, 2003 (.80), December 22, 2003 (1.30), December 23, 2003 (1.30), January 9, 2004 (1.50), January 21, 2004 (3.00), January 22, 2004 (2.90), January 23, 2004 (5.00), March 2, 2004 (.20), March 3, 2004 (.50), March 4, 2004 (2.00), and March 5, 2004 (2.20).

have waived the normal exhaustion requirement) to pursue a futile administrative process for purposes of delay. This presents a close question because, on one hand, there had not been a final interpretation of the plan by the plan administrator at the time Plaintiffs initiated this lawsuit. Indeed, as the Court noted in an earlier order, Plaintiffs commenced this lawsuit about a week after filing their claims for severance benefits. On the other hand, Plaintiffs make a persuasive argument that the outcome of the administrative process was a foregone conclusion and they should not have been required to pursue it at all.

The principal case from our circuit on this point is Anderson v. Proctor & Gamble Co., 220 F.3d 449 (6th Cir. 2000), in which the Court held that a prevailing ERISA claimant could not recover attorney's fees for the administrative phase of a benefits proceeding. Id. at 456. In Anderson, as opposed to this case, the plaintiff prevailed during her administrative appeal and filed a federal suit solely for the purpose of recovering her attorney's fees. In this case, Plaintiffs filed suit in federal court to recover benefits alleged to be due, and only later incurred fees in the administrative process. Nevertheless, Peterson v. Continental Cas. Co., 282 F.3d 112 (2nd Cir. 2002), on which Plaintiffs rely, is also distinguishable. In Peterson, the claimant filed a claim for benefits and pursued the claim through a final decision at the administrative level

before filing suit in federal court. The district court remanded the case to the plan administrator to consider the medical evidence against the claimant's true regular occupation. The plan administrator again denied benefits to the claimant. The district court held that the plan administrator's decision was arbitrary and capricious and reversed the decision. The district court awarded the claimant attorney's fee incurred during the administrative process both before and after she filed the federal suit. On appeal, the Court held that the claimant could not recover the attorney's fees she incurred for the pre-litigation administrative process, but that she could recover the attorney's fees she incurred in the second administrative proceeding after the district court acquired jurisdiction and remanded the case to the plan administrator. See id. at 119-23.

This case is distinguishable from Peterson because Plaintiffs had not exhausted any administrative process when they filed this lawsuit. Moreover, this Court did not remand issues to the plan administrator for reconsideration. Rather, the Court merely stayed the case so that the initial administrative process could be completed. Thus, this case is more like Anderson and the Peterson Court's holding on pre-litigation administrative process fees, than the Peterson Court's holding on post-litigation administrative process fees. In other words, Plaintiffs filed this lawsuit at such an early stage in the

process that, although they incurred legal fees during administrative proceedings post-litigation, in reality the administrative process was the functional equivalent of a pre-litigation proceeding. Therefore, the Court finds that Anderson controls the decision here and mandates that Plaintiffs may not recover attorney's fees for exhausting the administrative process. Similarly, Plaintiffs should not recover fees for time spent litigating the motion to stay as these fees would not have been incurred had they allowed the administrative process to play out. Although the Court is not without misgivings about this decision because of the relative predictability of the plan administrator's decision, a contrary result would tend to encourage the premature institution of federal proceedings and thwart the purpose of requiring exhaustion of remedies in ERISA cases. Costantino v. TRW, Inc., 13 F.3d 969, 975 (6th Cir. 1994) (listing policies behind administrative exhaustion requirement).

The Court's review shows that Ms. Groh spent 140.75 hours on the administrative process and litigating the motion to

stay¹⁰ and Mr. Murdock spent 44.75 hours on these tasks.¹¹ The Court will, therefore, deduct an additional 185.50 hours from the total claimed. The subtotal of hours allowed thus far is 1,474.08.

The next issue for consideration is whether Plaintiffs should be awarded attorney's fees for time spent on discovery issues. International Paper argues that Plaintiffs should not be compensated for pursuing unnecessary discovery disputes. International Paper seeks to exclude hours billed for drafting discovery requests and preparing and filing two motions to compel to obtain documents that were not part of the administrative record and therefore not relevant to the case. Plaintiffs' discovery fees are split between merits issues and class certification issues. The Court agrees with International Paper that Plaintiff should not recover fees for time spent preparing

¹⁰ As indicated by the following entries with the hours expended in parentheses: March 20, 2001 (8), March 21, 2001 (5.5), March 22, 2001 (10), March 23, 2001 (6.50), April 4, 2001 (4), April 5, 2001 (4), April 6, 2001 (6), April 9, 2001 (7), April 12, 2001 (.75), April 23, 2001 (3.50), April 27, 2001 (3), September 25, 2001 (1.50), October 10, 2001 (11), October 11, 2001 (12), October 12, 2001 (12), October 13, 2001 (6), October 14, 2001 (10), October 15, 2001 (7), December 7, 2001 (5), December 10, 2001 (9), December 11, 2001 (2), January 11, 2002 (5), and January 14, 2002 (2).

¹¹ As indicated by the following entries with the hours expended in parentheses: March 20, 2001 (6.25), March 22, 2001 (7.75), March 23, 2001 (5.50), March 30, 2001 (1.50), April 4, 2001 (3.50), April 6, 2001 (1.50), April 9, 2001 (6.50), April 12, 2001 (.75), April 23, 2001 (1.50), April 27, 2001 (1.50), December 7, 2001 (2.75), December 11, 2001 (1.50), January 11, 2002 (3.25), and January 14, 2002 (1).

merits-based discovery requests and motions, although Plaintiffs should be compensated for class certification discovery issues.

In an ERISA case, the Court's review is typically limited to the record that was before the plan administrator, and the plaintiff is not entitled to discovery beyond the administrative record except to resolve procedural issues on claims of denial of due process by the plan administrator or claims of alleged bias on the part of the plan administrator. Putney v. Medical Mut. of Ohio, 111 Fed. Appx. 803, 806-07 (6th Cir. 2004). In their reply brief, Plaintiffs argue that pursuit of discovery was necessary to develop a factual basis for such due process and bias claims. See Doc. No. 53, at 25-26. The Court notes, however, that counsel expended hours on discovery issues at the outset of the case, when the administrative process had just commenced. At that early stage, until Plaintiffs had actually been thwarted by the plan administrator in their attempt to develop a proper administrative record, and had suffered prejudice as a result by a denial of their claims, there was no need to conduct discovery on these issues. This points out the wisdom of letting the plan's administrative process play out - it keeps the parties from pursuing issues that may not be of consequence.

Moreover, as opposed to a case involving a claim for medical or disability benefits in which there is likely to be

substantial documentary evidence to present to the plan administrator, in large part this case presented a question of plan interpretation based on a set of mostly undisputed facts. In other words, there was likely to be little dispute over the basic facts. Plaintiffs were participants in the plan, their employment with International Paper ended, and they were hired or were offered jobs by Smart Paper. The only question was whether that set of facts established entitlement to severance benefits under the plan. Thus, in the Court's opinion, there is very little the plan administrator could have done to unfairly restrict the administrative record. The Court, therefore, agrees with International Paper that at least some of the hours billed by counsel in pursuit of merits discovery issues will have to be deducted.

In determining how many hours to deduct for time expended on merits discovery issues, the Court is again faced with entries in which time on discovery is commingled with time on other issues. Initially, therefore, the Court will simply total hours in which discovery or merits discovery is an entry (excluding entries which clearly show time spent on class certification discovery, which the Court believes was time reasonably and properly spent) and then attempt to arrive at a proper estimation of the time that should be deducted. The Court's review of counsel's time sheets shows that Ms. Groh has

entries totaling 342.25 hours in which at least part of the time was expended on discovery issues.¹² Mr. Murdock's time sheet has entries totaling 43 hours in which at least some of the time was apparently expended on merits discovery.¹³ Mr. McGrath devoted four hours to discovery-related issues on February 21, 2001.

Initially, the Court finds that any hours expended by counsel on discovery issues before the administrative proceedings were completed were not reasonably and necessarily spent. Although Plaintiffs obviously had suspicions regarding the integrity of the proceedings, it is not reasonable to prepare to embark on a discovery expedition into bias and procedural issues before the process is completed and a final decision rendered. The Court will, therefore, deduct all hours expended on discovery

¹² As indicated by the following entries with the hours expended in parentheses: February 21, 2001 (14), February 23, 2001 (5.5), May 28, 2001 (2.5), May 29, 2001 (4), May 30, 2001 (7), May 31, 2001 (4), June 1, 2001 (2.5), June 2, 2001 (7), June 4, 2001 (10), June 5, 2001 (8.5), June 6, 2001 (.50), August 3, 2001 (6), August 10, 2001 (.50), August 17, 2001 (1), May 1, 2002 (10), May 2, 2002 (7.5), May 17, 2002 (2.5), June 3, 2002 (1), June 5, 2002 (1), June 6, 2002 (.50), June 18, 2001 (.75), June 19, 2001 (1), June 20, 2001 (2.5), July 30, 2001 (2), August 3, 2001 (6), August 10, 2001 (.50), August 17, 2001 (1), June 25, 2002 (12), June 26, 2002 (14), June 29, 2002 (13), June 30, 2002 (14), July 1, 2002 (12), July 2, 2002 (12), July 3, 2002 (14), July 8, 2002 (1), July 23, 2002 (3.0), July 24, 2002 (9), July 25, 2002 (11), July 27, 2002 (12), July 28, 2002 (14), July 30, 2002 (14), August 2, 2002 (14), August 3, 2002 (12), August 4, 2002 (12), August 6, 2002 (13), August 7, 2002 (10), August 8, 2002 (8), and August 9, 2002 (9).

¹³ As indicated by the following entries with the hours expended in parentheses: February 21, 2001 (12.25), May 1, 2002 (8.50), May 2, 2002 (4.25), May 23, 2002 (1), August 8, 2002 (10.25), and August 9, 2002 (6.75).

prior to December 7, 2001, when a final decision was rendered at the administrative level on Plaintiffs' claims for benefits. Where discovery entries are intermingled with entries on other tasks, the Court has assumed that 30% of the time was expended on discovery and reduced the hours accordingly. A 30% reduction is admittedly somewhat arbitrary, but is intended to reflect the Court's reasoned judgment on the amount of time likely to have been spent on discovery based on the content of the entire entry. The entries where the Court made estimates on time spent on discovery are identified below with an asterisk. The Court, therefore, makes the following reductions for time expended on merits discovery prior to the completion of the administrative process: Groh, 49.50 hours,¹⁴ Murdock, 3.68 hours,¹⁵ McGrath, 4 hours,¹⁶ for a total reduction of 57.18 hours.

The subtotal of hours allowed thus far is 1,416.90.

The next issue is whether more hours should be deducted for time spent on merits discovery after the administrative

¹⁴ As indicated by the following entries with the hours expended in parentheses: February 21, 2001 (4.2*), February 23, 2001 (1.65*), May 28, 2001 (2.5), May 29, 2001 (4), May 30, 2001 (7), May 31, 2001 (4), June 1, 2001 (2.5), June 2, 2001 (2.1*), June 4, 2001 (3), June 5, 2001 (8.50), June 6, 2001 (.50), June 18, 2001 (.75), June 19, 2001 (1), June 20, 2001 (2.5), July 30, 2001 (2), August 3, 2001 (1.8*), August 10, 2001 (.50), and August 17, 2001 (1).

¹⁵ As reflected in the February 21, 2001, representing a reduction of 30%.

¹⁶ Entry of February 21, 2001.

process was completed. The hours expended relate to Plaintiffs' motion to compel merits discovery (Doc. No. 27). Ultimately, this motion became moot because of the Court's ruling on the parties' cross-motions for judgment on the administrative record. Nonetheless, the issue here is not whether Plaintiffs' motion was successful or unsuccessful, but whether the hours expended by counsel pursuing discovery were necessary and reasonable. There remain 332.07 hours of entries with at least some time spent on merits discovery after the deduction of the 57.18 hours above. Applying the 30% assumption to 332.07 hours leaves an estimate of 99.62 hours spent in pursuit of merits discovery.

Under the circumstances of this case, the Court cannot say that 99.62 hours expended on merits discovery was unreasonable or unnecessary. As the Court indicated, supra at 5-6, the plan administrator's interpretation of the plan suggested bad faith. In addition, although the Court has disallowed hours expended on the administrative process, there was a reasonable basis for counsel to believe that the administrative process was likely to be only a formality. Therefore, the Court believes that Plaintiffs' had a reasonable basis to pursue bias and due process discovery under the Wilkins decision. In Heffernan, the Court permitted the plaintiff to recover forty-hours of attorney's fees for discovery when she raised a procedural challenge to the plan administrator's decision. See Heffernan,

104 Fed. Appx. at 109. Because of the rather unique nature of the case, the Court does not believe that awarding Plaintiffs a little more than double the fees in Heffernan in pursuit of a procedural challenge is unwarranted. Accordingly, the Court will not make any further deductions for hours expended on discovery.

International Paper also objects to a number of hours billed by attorney Myron Wolf. It appears from the record that Plaintiffs initially contacted Mr. Wolf about their claims, who then referred the case to Ms. Groh and Mr. Murdock. Thereafter, it appears that Mr. Wolf acted primarily in a liaison or consultative capacity. Mr. Wolf submitted a bill for \$20,693.75. representing 75.25 hours of time at \$275.00 per hour. See Doc. No. 46. As International Paper correctly points out, after the initial referral and consultations with Ms. Groh and Mr. Murdock, which appear to have been completed on or about February 16, 2001, almost the entirety of Mr. Wolf's remaining time entries consist of receiving and reviewing pleadings and letters filed or sent by others. There is no indication in the time sheets that receiving and reviewing this documents triggered any tangible action which contributed to the overall success of the case. To the extent that simply receiving and reviewing pleadings and letters contributed in a substantive manner to the case, this activity was clearly duplicative of work performed by Ms. Groh and Mr. Murdock. Therefore, the Court disallows all hours billed

by Mr. Wolf after February 16, 2001, a total of 54.75 hours. The Court allows 20.5 hours for services rendered by Mr. Wolf from the inception of the case through February 16, 2001.

The subtotal of hours allowed thus far is 1,362.15.

International Paper also complains about other duplicative hours, block billing, and counsels' billing increments. International Paper also complains that expensive partners performed work that could have been done by less expensive associates. Where block billing seemed to impose an obstacle in determining the reasonable hours expended, the Court made what it believes are appropriate adjustments to account for the ambiguity of the entry. The Court is cognizant that in some cases a plaintiff would not recover fees for work performed by partners that could have been done by an associate. On the other hand, as pointed out in their papers, Plaintiffs' counsels' firm has only four lawyers and one associate. Thus, the division of labor between partner and associate can go only so far. Under similar circumstances, the Seventh Circuit ruled that the district court erred in reducing plaintiff's fee award where she was represented by a small firm. See Price v. Marshall Erdman & Assoc., Inc., 966 F.2d 320, 327 (7th Cir. 1992). This is also a double-edged argument, because it is possible that a partner can do the required work more quickly and efficiently than an associate. See In re Boston & Maine Corp., 776 F.2d 2, 9 (1st

Cir. 1985) ("Associates, however, are not invariably more cost-effective than partners. In some circumstances, and assuming of course that the partner is not performing merely routine work, the use of a more experienced attorney may save time because of his ability to size-up and do only what needs to be done most effectively."). Therefore, the Court will not make any further reduction in the hours allowed on the grounds that an associate could have performed work done by partners.

The Court does agree, however, that counsel's time sheets reflect unnecessary duplication of effort on certain occasions. The Court particularly observes duplication where two or more lawyers appear to have performed the same task on the same day. The Court outlines these seemingly duplicative hours below:

February 17, 2001

TLG - research & fact investigation; conferences with JCM, VBM, and JSG	12 hours
JSG - conferences with TLG, JCM & VBM; research	6 hours
VBM - research ERISA; conferences with TLG, JCM & JSG	4 hours

February 18, 2001

JCM - research & fact investigation; conferences with TLG & VBM	12.75 hours
TLG - research & fact investigation; conferences with JCM & VBM	14 hours

VBM - research ERISA; conferences with JCM & TLG 6 hours

February 19, 2001

JCM - research & draft complaint; conferences with TLG, VBM & JSG 10.5 hours

TLG - research & draft complaint; conferences with JCM, VBM & JSG 12 hours

JSG - conferences with TLG, JCM, & VBM 3 hours

VBM - research ERISA; conferences with JCM, TLG & JSG 8 hours

February 20, 2001

JCM - research & draft complaint; conferences JCM, TLG & JSG 10.75 hours

TLG - research & draft complaint; conferences with JCM & VBM 12 hours

VBM - research ERISA; conferences with JCM & TLG 8 hours

February 21, 2001

JCM - review/revise complaint; draft class representatives rights and responsibilities; draft first set of documents requests; draft memo to VBM re: discovery; conferences with TLG. 8.57 hours¹⁷

TLG - draft complaint; review JCM memo to VBM re: discovery; conferences with JCM; prepare for and meet with clients. 9.8 hours¹⁸

¹⁷ The actual entry is for 12.25 hours, but the Court has already deducted 3.68 hours from this entry in analyzing discovery fees. See supra, at 21.

¹⁸ As indicated in footnote 17, the actual entry was for 14 hours, but the Court has already deducted 4.20 hours in its discovery analysis.

February 22, 2001

JCM - prepare civil cover sheet and attachment to same; edit/revise complaint; conferences with TLG.	6.5 hours
TLG - draft, revise and finalized complaint; conferences with JCM; phone conferences with clients.	10 hours

June 12, 2001¹⁹

TLG - phone conference with witness.	1.5 hours
JCM - phone conference with witness.	1.5 hours

June 11, 2002

TLG - review Defendant's motion for judgment on administrative record; research.	11 hours
JCM - review Defendant's motion for judgment on administrative record; research.	8.50 hours

June 12, 2002

TLG - review Defendant's motion for judgment on administrative record; conference with JCM re: same; research.	14 hours
JCM - review Defendant's motion for judgment on administrative record; conference with TLG re: same.	7.25 hours

June 13, 2002

JCM - review/analyze Defendant's motion for judgment on administrative record; follow up research.	6 hours
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¹⁹ There were also some apparently duplicative hours billed in March and April 2001 in reference to litigating the International Paper's motion to stay. The Court, however, has already deducted all of these hours in its exhaustion of administrative remedies analysis. See supra, at 17.

TLG - meeting with SV re: research and organization of administrative record; research re: Defendant's motion for judgment. 12 hours

June 15, 2002

TLG - research re: Defendant's motion for judgment; conference with JCM. 12 hours

JCM - conference with TLG re: research and motion for judgment; review/analysis of Defendant's motion for judgment. 12 hours

June 30, 2002

TLG - research issues re: Defendant's motion for judgment, Plaintiffs' entitlement to judgment; Plaintiff's entitlement to discovery; phone conferences with clients and other employees; draft affidavits; conference with JCM re: class certification research and brief sections and strategy. 14 hours

JCM - draft, and supplemental research, Plaintiffs' motion for class certification; conference with TLG re: class certification research and brief sections and strategy. 11.5 hours

July 2, 2002

TLG - draft opposition to judgment motion; research issues re: Defendant's motion for judgment, Plaintiffs' entitlement to judgment; Plaintiffs' entitlement to discovery; phone conferences with clients and other employees; draft affidavits; conference with JCM re: class certification research and brief sections and strategy. 12 hours

JCM - assist in draft/edit opposition to judgment motion; research and final edits to Plaintiffs' motion for class certification; conference with TLG re: class certification research and brief sections and strategy. 10.5 hours

July 24, 2002

TLG - review Defendant's supplement to administrative record; review Defendant's response to motion to compel discovery related to the merits; conference with JCM; review and research Defendant's opposition to Plaintiffs' motion for judgment.	9 hours
JCM - review Defendant's response to Plaintiffs' motion to compel discovery related to class certification; strategy conference with TLG.	3.25 hours

July 25, 2002

TLG - review Defendant's supplement to administrative record; review Defendant's response to motion to compel discovery related to the merits; conference with JCM; review and research Defendant's opposition to Plaintiffs' motion for judgment.	11 hours
JCM - review/analysis of Defendant's reply/opposition memorandum; conference with TLG.	7.25 hours

August 4, 2002

TLG - research, draft and revise reply memorandum in support of Plaintiff's motion for judgment; Plaintiffs' motion to compel.	12 hours
JCM - research and assist in drafting reply memorandum in support of Plaintiff's motion for judgment; research and draft reply memorandum in support of class certification.	5.75 hours

August 7, 2002

TLG - Research, draft and revise reply memorandum in support of Plaintiffs' motion for judgment, Plaintiffs' motion to compel; conference with JCM re: reply memorandum in support of class certification.	10 hours
JCM - research and draft reply memorandum in support of class certification; conference with TLG re: same.	12 hours

August 8, 2002

JCM - draft reply in support of Plaintiffs' motion for class certification; conference with TLG; assist in edit/revision Plaintiffs' reply memorandum in support of Plaintiff's motion for judgment, Plaintiffs' motion to compel. 10.25 hours

TLG - research, draft and revise reply memorandum in support of Plaintiffs' motion for judgment, Plaintiffs' motion to compel; conference with JCM re: reply memorandum in support of class certification. 8 hours

August 9, 2002

TLG - letter to Roberts, Younger/McElligott; research, draft and revise reply memorandum in support of Plaintiffs' motion for judgment, Plaintiffs' motion to compel; conference with JCM re: reply memorandum in support of class certification; phone conference with clients. 9 hours

JCM - draft/edit reply in support of Plaintiffs' motion for class certification; draft reply in support of motion to compel re: merits; conference with TLG. 6.75 hours

November 25, 2002

TLG - review Roberts letter w/attached IP motion to supplement motion for judgment on administrative record; conference with JCM; research. 3 hours

JCM - review/analysis of IP motion to supplement motion for judgment on administrative record; conference with TLG. 2.5 hours

December 3, 2002

JCM - review and revise opposition supplement; conference with TLG. 2 hours

TLG - conference with JCM; finalize opposition to motion to supplement. 3 hours

February 6, 2003

TLG - prepare for and participation in conference with Court, conference with JCM re: same. 4 hours

JCM - conference with TLG; prepare for and participate in Court conference. 3 hours

May 22, 2003

TLG - conference with JCM re: judgment issues and settlement; phone conference with opposing counsel; research fees and interest issues. 7.5 hours

JCM - conference with TLG re: judgment issues and settlement; preparation for phone conference with opposing counsel; phone conference re: final judgment with opposing counsel and follow up. 4 hours

May 30, 2003

TLG - prepare for phone conference with defense counsel re: outstanding issues for final judgment entry; conference with JCM; phone conference with McElligott re: final judgment issues. 2 hours

JCM - prepare for phone conference with defense counsel re: outstanding issues for final judgment entry; conference with JCM. 2.5 hours

June 20, 2003

TLG - prepare for phone conference; phone conference with Judge Beckwith re: final judgment entry and briefing schedule. 2 hours

JCM - prepare for phone conference; phone conference with Judge Beckwith re: final judgment entry and briefing schedule; detailed review of IP proposed notice and draft Exhibit A for notice. 5.25 hours

July 2, 2003

TLG - revised notice; conference with JCM; letter to M. Wolf.	2 hours
JCM - draft proposed notice; conference with TLG.	2.25 hours

July 7, 2003

JCM - draft, revise and finalize proposed notice; conference with TLG; draft correspondence to James McElligott enclosing final class notice and Exhibit A's proposed by Plaintiffs.	3.5 hours
TLG - review proposed notice submitted to Court; conference with JCM.	2 hours

August 25, 2003

TLG - review Court order approving distribution of notice to the class; conferences with JCM and SAV re: the procedure for drafting and sending notice to the class.	1.20 hours
JCM - conference with TLG and SAV re: drafting and sending notice to the class.	.80 hours
SAV - conference with TLG and JCM re: sending notice to the class.	.80 hours

August 28, 2003

JCM - review final notice and draft recommended changes; conference with TLG re: same; conference with SAV re: issuance of notice.	.50 hours
TLG - conference with JCM re: final notice language	.20 hours
SAV - conference with JCM re: sending notice to the class.	.30 hours

September 8, 2003

TLG - conference with JCM and review of class notice and Exhibit A drafts; review stipulated entry approving amended class action notice, conference with JCM re: same.	.80 hours
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JCM - draft entry and forward to opposing counsel 3.20 hours
 approving Rule 23 class action notice; final
 review of class notice with Exhibit A and
 forwarded to opposing counsel; conference with
 TLG re: class notice, attachments thereto and
 entry opposing same.

September 19, 2003

TLG - conference with JCM re: modification of notice .30 hours
 to the class.

JCM - conference with TLG re: modification of notice .30 hours
 to the class.

September 23, 2003

TLG - coordinate and finalize class action notice; .80 hours
 conferences with JCM and SAV re: same.

JCM - conference with TLG and SAV re: class action .30 hours
 notice.

SAV - meeting with CP re: giving instructions on 2.70 hours
 format of Flex Six documents to be typed;
 obtain envelopes for mailing; prepare notice
 of mailing; conferences with JCM and TLG re:
 class notice.

November 12, 2003

TLG - Draft and revise Plaintiffs' responses to 4.50 hours
 Defendant's interrogatories and requests for
 production of documents; phone conferences with
 clients re: same; conference with JCM re:
 same; conference with SAV re: same.

JCM - conference with TLG re: Plaintiffs' responses .30 hours
 to Defendant's interrogatories and requests for
 production of documents.

SAV - revise exhibits to discovery responses; .50 hours
 prepare Exhibit for discovery response;
 conference with TLG re: same.

July 26, 2004

TLG - draft and revise report to Court re: class notice and need for final judgment entry; conference with JCM re: pension enhancement valuation and expert report re: same. 3.70 hours

JCM - conference with TLG re: pension valuation and Rosen work on report re: same. .50 hours

July 27, 2004

TLG - draft and revise report to the Court re: class notice and need for final judgment entry; compile exhibits and draft affidavits to the Plaintiffs' report; conference with JSG re: pension valuation. 2.80 hours

JSG - conference with TLG; valuation and analysis related to Flex 6 recipients. 1.80 hours

August 5, 2004

TLG - phone conference with H. Rosen re: calculation of Flex Six Pension Enhancement value to class; review pension enhancement calculations on the 17 Exhibit A's for the qualified class members; review the entire retirement plan; compile materials to transmit to H. Rosen and draft letter re: same; conference with JCM re: same. 3.20 hours

JCM - conference with TLG re: expert valuation of the pension enhancements. .50 hours

August 6, 2004

TLG - phone conferences with H. Rosen re: preliminary calculations and report to submit to the Court; identify missing information and conference with SAV re: follow up to get information on dates of birth and race information; conference with JCM re: same. 1.50 hours

JCM - conference with JCM re: expert analysis of pension enhancement. .50 hours

SAV - conference with TLG re: filling in missing information for the pension valuation. .20 hours

August 9, 2004

TLG - review retirement plan and conference with H. Rosen re: preliminary report on Flex Six enhancement value; conference with SAV re: follow up information; review time entries and revise for supplemental motion. 6.20 hours

SAV - conference with TLG re: information for pension enhancement; review file for information re: Flex 6 class members' DOB and race; LocatePlus searches; telephone conferences with class members re: knowledge of Flex 6 class members' DOB and race; prepared chart re: same. 2.40 hours

These entries reflect that there were potentially 483.17.

duplicative hours, with emphasis on the word "potentially."²⁰

The first thing that stands out from this set of entries is a number of duplicative billings for counsel to confer with each other.²¹ In other words, where two or more lawyers conferred together, each submitted an entry for the time spent in the conference. Thus, depending on the number of lawyers involved in the conference, the same hour could be billed two or three times. Although the Court recognizes the importance of

²⁰ The subtotals for these hours are: Groh, 256.00 hours; Murdock, 183.47 hours; Vaaler, 6.90 hours ; McGrath, 26 hours; Goldenberg, 10.80 hours.

²¹ There was also substantial conferencing among counsel on the attorney's fees and the vacation pay issues. The Court, however, has already deducted hours expended on these issues and, therefore, to avoid double-counting, did not itemize conferences on these issues. In addition, the Court has already deducted hours expended in exhausting the administrative process and did not separately itemize apparent duplicative hours related to exhaustion of administrative remedies.

periodic conferences among trial counsel, the trial court may nevertheless deduct hours for excessive conferencing. See Guckenberger v. Boston Univ., 8 F. Supp.2d 91, 101 (D. Mass. 1998); Citibank, N.A. v. Hicks, No. Civ. A. 03-2283, 2004 WL 1895189, at *6 (E.D.Pa. Aug. 24, 2004).

The Court is again faced with the problem that the time spent in conference is not clearly delineated in the entries. A clearer picture emerges in later entries where one attorney entered a block of time for a number of tasks, including conferences, and another attorney only billed time for conferencing.²² On those occasions, it appears that conferences accounted for anywhere from about 10% to about 25% of the amount of time of the primary entry. It, therefore, seems reasonable to estimate that, where conferences were convened, approximately 15% of the gross time billed was spent in conferences. Of the entries on the forty-one separate dates detailed above, conferences were held on thirty-five of them. The Court, therefore assumes that 85% (35/41), or 410.69 hours, of the 483.17 hours includes conference time. Of this 410.69 hours, the Court further assumes that 15%, or 61.60 hours, constitutes duplicative hours spent in conference. In order to avoid multiple recoveries for the same hour of conferencing, the Court

²² See, e.g., entries of August 25, 2003, September 8, 2003, September 23, 2003, November 12, 2003, July 26, 2004, August 5, 2004.

will then deduct 50%, or 30.80 hours, of the 61.60 hours in conferences as being duplicative. Overall, this is approximately a 6.375% (85% x 15% x 50%) reduction of the potentially duplicative hours outlined above.²³

The subtotal of hours allowed thus far is 1,331.35.

The other area of noticeable duplication of effort was in the drafting of pleadings. Not including time spent on research and fact investigation, and with a 6.375% allowance for time already deducted for conferencing, two lawyers expended 75.01 hours²⁴ researching and drafting a twelve page, one claim complaint. This is an excessive amount of time, particularly when one considers that it does not include approximately 96 hours expended just prior to the drafting of the complaint on initial research and fact investigation. Because of the relatively straightforward facts of the case, a more reasonable amount of time to complete research and draft the complaint is 40 hours. The Court will, therefore, deduct a further 35.01 hours

²³ Consequently, this results in a 6.375% reduction in the subtotals described in footnote 20, supra. Groh (16.32 hours), Murdock (11.69 hours), Vaaler (.44 hours), McGrath (1.66 hours), and Goldenberg (.69 hours).

²⁴ As indicated by the following entries with the hours expending in parentheses: February 19, 2001 (Murdock - 10.5; Groh - 12); February 20, 2001 (Murdock - 10.75; Groh - 12); February 21, 2001 (Murdock - 8.57; Groh 9.8); February 22, 2001 (Murdock - 6.5; Groh - 10). These figures are the total hours before applying the 6.375% deduction for conferences. Additionally, the entries for February 21, 2001, are the net hours remaining after the deductions for time expended on discovery.

from the total hours allowed, distributed proportionally between the lawyers. This results in a 15.87 hour deduction from Mr. Murdock's billings and a 19.14 hour deduction from Ms. Groh's billings. No further deductions will be made from time expended on initial research and investigation because the Court hesitates to enter any order which would tend to discourage, however remotely, compliance with Rule 11.

The subtotal of hours allowed thus far is 1,296.34.

The final area of possible duplication of effort or excess expenditure of hours the Court will consider is the time spent researching and briefing the cross-motions for judgment on the administrative record and the motion for class certification. By the Court's estimation, between June 2002 and December 2002, counsel expended approximately 245 hours completing the merits and class certification briefing. The Court does note that included in this estimation are hours spent pursuing discovery, which the Court has nonetheless allowed. Therefore, the actual hours expended on dispositive motions is actually less than 245. Nonetheless, the Court does not find that these hours were unnecessarily or duplicatively expended. This was the most crucial juncture of the case and counsel had to draft their own motion for judgment as well as an opposition to International Paper's motion for judgment. The briefs were well done and obviously resulted in success for the Plaintiffs. Consequently,

the Court will not deduct any further hours as being duplicative or unnecessarily expended.

International Paper also objects to counsel's time sheets because counsel billed in fifteen minute increments instead of six or ten minute increments. Although International Paper lodges a blanket objection against this practice, it has not identified any single entry which was inflated as result of having been billed in fifteen minute increments. In any event, the Court has thoroughly dissected the hours expended and has encapsulated and adjusted for any inflation caused by the billing increments. Therefore, the Court will not impose any additional reductions in the hours claimed because of the billing increments.

For the reasons stated above, the Court finds the following hours were reasonably expended:

	<u>Claimed</u>	<u>Deducted</u>	<u>Allowed</u>
Groh	1,260.05	(529.93)	730.12
Murdock	451.55	(113.19)	338.36
Wolf	75.25	(54.75)	20.50
Goldenberg	17.70	(0.69)	17.01
McGrath	32.50	(5.66)	26.84
Naylor	21.30	(13.30)	8.00
Vaaler	<u>258.55</u>	<u>(103.04)</u>	<u>155.51</u>
Total	2,116.90	(820.56)	1,296.34

The Court then adds an additional 3% to each attorney's hours for preparation and litigation of the fee application:

	<u>Allowed</u>	<u>Fee Application</u>	<u>Final Total</u>
Groh	730.12	21.90	752.02
Murdock	338.36	10.15	348.51
Wolf	20.50	.62	21.12
Goldenberg	17.01	.51	17.52
McGrath	26.84	.81	27.65
Naylor	8.00	.24	8.24
Vaaler	<u>155.51</u>	<u>4.67</u>	<u>160.18</u>
Total	1,296.34	38.90	1,335.24

C. The Reasonable Rate

To arrive at a reasonable hourly rate, courts use as a guideline the prevailing market rate, defined as the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record. Geier v. Sundquist, 372 F.3d 784, 791 (6th Cir. 2004).

As indicated above, Ms. Groh seeks compensation at a rate of \$325 per hour; Mr. Murdock seeks \$300 per hour; Mr. Wolf and Mr. Goldenberg seek \$275 per hour; Mr. Naylor seeks \$200 per hour; and Mr. McGrath seeks \$150 per hour. Paralegal Stephanie Vaaler seeks compensation at \$85 per hour. Supporting Ms. Groh's and Mr. Murdock's claimed rates is the affidavit of local

attorney Carl Stich, Jr., a partner in the firm of White, Getgey & Meyer Co., LPA, who states that based on his knowledge of rates charged by local litigation attorneys of comparable skill and experience, a reasonable fee for Ms. Groh's and Mr. Murdock's services is between \$275 and \$350 per hour. Mr. Stich states further that the rates claimed by Ms. Groh and Mr. Murdock are well within the rates charged by comparable attorneys in this field and in this area. Doc. No. 45, Ex. 5. Mr. Stich also vouches for Ms. Groh's and Mr. Murdock's professional skill and reputation as being of the highest caliber. Id. The remaining attorneys' claimed rates are supported by their own affidavits which set forth their qualifications, bar admissions, and customary hourly rates. Id. Ex. 3; Doc. No. 46.

International Paper contends that the rates charged by Plaintiffs' counsel are excessive for this area and for their skill, experience, and reputation. International Paper argues that the following rates are reasonable for Plaintiffs' counsel - \$215 per hour for Ms. Groh and Mr. Wolf; \$190 per hour for Mr. Murdock and Mr. Goldenberg; \$165 per hour for Mr. Naylor. International Paper agrees that a rate of \$150 per hour is reasonable for Mr. McGrath. Doc. No. 49, at 8 n.13. International Paper objects to the rate claimed by Ms. Vaaler as being completely unsubstantiated as to its reasonableness. International Paper's argument is supported by a study published

by the Ohio State Bar Association entitled "Desktop Reference on the Economics of Law Practice in Ohio" which reports average hourly rates charged by office location, size of firm, area of practice, and years of practice. Doc. No. 49, Ex. 2.

International Paper's position is also supported by the affidavit of local attorney Jack Fuchs, a partner with the firm Thompson, Hine LLP who specializes in employee benefits litigation. Id. Ex. 3. Mr. Fuchs avers that based on his experience and knowledge of his own rate (\$260 per hour) and rates charged by other ERISA litigators, a reasonable hourly rate in 2001 for an attorney with more than fifteen years of experience would be between \$225 and \$275 per hour and between \$175 and \$225 for litigators with eight to fifteen years of experience. Mr. Fuchs further states that in his estimation, rates would increase between \$5 and \$15 per year in subsequent years.

Upon review of the evidence before it as well as the Court's experience awarding attorney's fees in other cases, the Court finds that the following are the reasonable rates for Plaintiffs' counsel: Ms. Groh and Mr. Wolf - \$275.00 per hour; Mr. Murdock and Mr. Goldenberg - \$225 per hour; Mr. Naylor - \$175 per hour; Mr. McGrath - \$150 per hour; and Ms. Vaaler - \$85 per hour. There are several justifications for arriving at these rates.

First, with regard to Ms. Groh's hourly rate, the Court notes that \$275 per hour is the rate which both Plaintiffs' expert and Defendant's expert agree, albeit at the margins, is a reasonable rate to pay an attorney of Ms. Groh's experience, ability and reputation. Consequently, both sides would be hard-pressed to argue that \$275 per hour is an unreasonable rate of compensation. Second, a rate of \$275 per hour approximates a reasonable extrapolation of the reasonable market rates for attorneys in the Cincinnati area established by former Chief Judge Rubin's committee.²⁵ Although Ms. Groh is technically not a senior partner under the parameters established by the Rubin Committee, she is rapidly approaching that bracket. A 4% COLA applied to a rate of \$128.34 per hour (the Rubin Committee rate

²⁵ In 1983, in response to the growing number of statutes that required the trial court to determine a reasonable fee to award the prevailing party, former Chief Judge Carl Rubin of the Southern District of Ohio formed a committee to determine a reasonable fee for attorneys in the Cincinnati area. Recognizing that seasoned attorneys are more valuable than attorneys with lesser experience, the committee arrived at the following categories and hourly rates: Paralegals - \$37.91/hour; Law Clerks - \$23.96/hour; Young Associates (2 years of experience or less) - \$61.77/hour; Intermediate Associates (2 to 4 years of experience) - \$71.62/hour; Senior Associates (4 to 5 years of experience) - \$82.81/hour; Young Partners (6 to 10 years of experience) - \$96.39/hour; Intermediate Partners (11 to 20 years of experience) - \$113.43/hour; and Senior Partners (21 or more years of experience) - \$128.34/hour. See Beya v. Hoxworth Blood Center, Case No. 1:96-CV-407 (S.D. Ohio, Aug. 25, 1998) (Beckwith, J.) (Doc. No. 183). This Court has approved applying a 4% annual cost of living adjustment ("COLA") to the rates established by the Rubin Committee. See James v. Runyon, 868 F. Supp. 911, 913-14 (S.D. Ohio 1994) (Beckwith, J.); See James v. Frank, 772 F. Supp. 984, 1000 (S.D. Ohio 1991) (Jones, Circuit Judge, sitting by designation).

for senior partners) for 20 years (to the year 2003, approximately the mid-point of this litigation) results in an hourly rate of \$281.41. Finally, the Court notes that in a more recent case, Vann v. University of Cincinnati, No. C-1-00-846, 2001 WL 1842468 (S.D. Ohio Jan. 2, 2001) (Beckwith, J.), a civil rights case, it awarded plaintiff's senior trial counsel an hourly rate of \$250 per hour. A 4% COLA applied to \$250 results in an hourly rate of \$270.40. In other words, application of a number of different, yet logical, methodologies consistently results in an hourly fee in the neighborhood of \$275 per hour for an attorney of Ms. Groh's experience, reputation, and ability. Therefore, the Court finds that \$275 per hour is a reasonable rate to pay Ms. Groh for her services.

Mr. Wolf requests compensation at a rate of \$275 per hour. Although his affidavit reflects more years of experience than Ms. Groh, the time sheets show that Mr. Wolf's role in the case was minor. The Court sees no reason to pay Mr. Wolf more than he is requesting for his limited participation in the case. Accordingly, the Court finds that a rate of \$275 per hour is reasonable for Mr. Wolf's services.

Mr. Murdock moves to be paid at a rate of \$300 per hour. Despite Mr. Stich's affidavit to the contrary, this rate is too high based on Mr. Murdock's years of experience. According to Mr. Fuchs, Mr. Murdock's services are worth between

\$175 to \$225 per hour. The Court finds that \$225 per hour is too low. Again, applying the Rubin Committee standards, based on his years of experience, Mr. Murdock technically falls within the young partner bracket, but like Ms. Groh, he is rapidly approaching the next tier, which is intermediate partner. Applying the same 4% COLA over a twenty year period results in an hourly rate of \$248.54. Therefore, the Court finds that a rate of \$250 per hour is reasonable for Mr. Murdock. Although \$250 per hour is not intended to be a compromise rate of compensation, the Court does note that \$250 an hour exactly splits the difference between the high suggested by Mr. Fuchs and the low suggested by Mr. Stich. This further suggests that \$250 per hour for Mr. Murdock is a reasonable rate.

Mr. Goldenberg has roughly the same years of experience as Mr. Murdock. Therefore, the Court awards Mr. Goldenberg a rate of \$250 per hour.

Mr. Naylor requests compensation at a rate of \$200 per hour. Mr. Naylor falls squarely in the young partner bracket of the Rubin Committee. Applying the 4% COLA over a twenty-year period results in a rate of approximately \$211 per hour. There is no other evidence supporting a reasonable fee for Mr. Naylor's services. Like Mr. Wolf, however, the Court sees no reason pay Mr. Naylor a premium rate for his limited participation in the

case. Accordingly, the Court awards Mr. Naylor a rate of \$200 per hour.

The parties agree that \$150 per hour is a reasonable rate for Mr. McGrath. Accordingly, the Court awards Mr. McGrath \$150 per hour.

Finally, Ms. Vaaler requests compensation at a rate of \$85 per hour. Application of the Rubin Committee factors results in a rate of \$83.07 per hour. Therefore, the Court finds that \$85 per hour for Ms. Vaaler's services is reasonable.

D. Fee Multiplier

Plaintiffs move for a multiplier of 1.5 times the lodestar fee for the quality of service performed in comparison to the hourly rate, the exceptional results obtained, and the contingent nature of the case. As noted above, however, Plaintiffs cannot obtain a multiplier of the lodestar because counsel took the case on a contingent basis. See supra, at 8.

In Geier, the Sixth Circuit analyzed and distilled a number of Supreme Court cases addressing the appropriateness of awarding the plaintiff a lodestar multiplier. According to the Court, many of the factors which the trial court would consider in determining whether to apply a multiplier are already subsumed in calculating the reasonable fee. See Geier, 372 F.3d at 794. Nevertheless, the Geier Court held that the district court could apply a multiplier to the lodestar if first it determined that

the case was one of the "rare and exceptional cases" deserving of a multiplier. Id. at 794-95. Once the trial court decides that the case is rare and exceptional, it may then consider a list of factors to determine whether to award a fee multiplier. Id.²⁶

Unfortunately, the Geier Court did not further explain the circumstances under which a case becomes "rare and exceptional." The Court did, however, decide that the case before it was rare and exceptional and remanded it to the trial court to analyze the factors listed above. The plaintiffs in Geier prevailed in a thirty-six year struggle to eliminate segregation in Tennessee's public universities. In holding that the case before it was exceptional, the Court stated that its "magnitude is formidable in numerous respects." Id. at 795. The Court noted that the "legal principles advanced by the Geier Plaintiffs were pathbreaking and of great social import." Id. The plaintiffs fought against stubborn state opposition and contrary judicial precedents from outside this Circuit to obtain injunctive relief valued at \$320 million. In addition, the Geier

²⁶ Those factors are: 1) the time and labor required; 2) the novelty and difficulty of the question; 3) the skill requisite to perform the legal service properly; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations imposed by the client or the circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation, and ability of the attorney; 10) the "undesirability" of the case; 11) the nature and length of the professional relationship with the client; and 12) awards in similar cases. Id. at 792.

case focused the federal judiciary on desegregation of higher education, steered federal jurisprudence in a different direction, and spurred the Justice Department to file lawsuits against other states, effectively ending segregation in public higher education in the South. Id. at 795-96.

The Geier plaintiffs set the bar very high for others. It is not apparent whether the Geier Court would require the plaintiffs in every case to have the nobility of purpose of those plaintiffs, coupled with the sweeping results of that litigation, to merit a multiplier of attorney's fees. A more cautious analysis of the case would be that the results in Geier were so stunning that it clearly was a rare and exceptional case but that it did not establish a minimum standard for other plaintiffs in other cases.

Nevertheless, if Geier did not set the standard for rare and exceptional cases, it certainly establishes a reference point for purposes of comparison. In comparison, the present case does not meet even reduced expectations for rare and exceptional cases. While Plaintiffs obviously achieved a good result for themselves and their fellow class members, the case itself is of limited social scope and impact. The fact that Plaintiffs prevailed under the arbitrary and capricious standard to some degree is already taken into consideration by the decision to award Plaintiffs attorney's fees at all. Moreover,

although prevailing under the arbitrary and capricious standard is not an every day occurrence, certainly it happens often enough not to make it a rare and exceptional circumstance. The Court does not view this case as having established a legal principle of any sweeping significance. Instead, this case presented a rather narrow matter of plan interpretation, dependent upon the meaning of the specific language at issue. The case may or may not have any precedential value in other cases, but it is not obvious that it does. Therefore, despite the size of the judgment obtained by the Plaintiffs and the difficult burden of persuasion to be carried, the Court does not find this to be a rare and exceptional case in which the lodestar should be enhanced by a multiplier.

E. Common Fund Analysis

Because this case proceeded to judgment and Plaintiffs received an award of attorney's fees through a fee-shifting statute, the Court finds that Plaintiffs' counsel may not receive a further enhancement of their fees through a common fund analysis. The case law suggests that fee-shifting cases and common fund cases are different and that the common fund method for awarding attorney's fees applies only when the parties settle the case. See Rawlings v. Prudential-Bache Properties, Inc., 9 F.3d 513, 516 (6th Cir. 1993) ("In assessing the reasonableness of requests for fees in class actions resulting in the creation of a

common fund, a court must consider factors that are not present in statutory fee-shifting cases."); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1268 (D.C. Cir. 1993) ("Unlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under [the fee shifting statute] . . . reflects the amount of time reasonably expended on the litigation.") (citing Blum v. Stenson, 465 U.S. 886, 900 n.16 (1984)). In Brytus v. Spang & Co., 203 F.3d 238 (3rd Cir. 2000), the Court indicated that it might be possible for prevailing class action ERISA litigants to receive a combination of the lodestar and common fund amount of fees, but suggested that instance would be limited to cases where the defendant was insolvent or had insufficient funds or where the plaintiffs could not obtain other competent counsel. Id. at 246-47. Those two exceptions, however, are not present in this case.

Finally, this Court notes that because International Paper is required to bear the reasonable costs of the litigation, the problem of freeriders, which is the primary justification for the common fund method of awarding fees, is not present. See Geier, 372 F.3d at 790 ("The [common fund] doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense."). In other words, because of the

fee-shifting statute, the class members are not unjustly enriched at the expense of the named Plaintiffs. Therefore, the Court finds that the attorney's fees to be awarded to Plaintiffs' counsel should not be increased under the common fund doctrine.

F. Incentive Awards for the Named Plaintiffs

Because, as explained above, this is not a common fund case, the Court finds that the named Plaintiffs are not entitled to an incentive award. See Hadix v. Johnson, 322 F.3d 895, 898 (6th Cir. 2003) ("As both the district court and the defendants note, incentive awards are usually viewed as extensions of the common-fund doctrine, a doctrine that holds that a litigant who recovers a common fund for the benefit of persons other than himself is entitled to recover some of his litigation expenses from the fund as a whole.").

G. Final Fees Awarded

	<u>Hours Allowed</u>	<u>Hourly Rate</u>	<u>Total</u>
Groh	752.02	\$275	\$ 206,805.50
Murdock	348.51	\$250	\$ 87,127.50
Wolf	21.12	\$275	\$ 5,808.00
Goldenberg	17.52	\$250	\$ 4,380.00
McGrath	27.65	\$150	\$ 4,147.50
Naylor	8.24	\$200	\$ 1,648.00
Vaaler	<u>160.18</u>	<u>\$ 85</u>	<u>\$ 13,615.30</u>

Total 1,335.24 \$ 323,531.80

G. Contingency Fee

Counsel for Plaintiffs also move the Court for permission to recover 25% of the value of the judgment as per their contingency fee agreement with Plaintiffs. The Court notes that it is permissible for counsel recover both a statutory fee and a fee under a contingency fee arrangement. Drennan v. General Motors Corp., 977 F.2d 246, 254 (6th Cir. 1993). Nevertheless, the district court still has authority to review and set aside an unreasonable contingent fee contract. Krause v. Rhodes, 640 F.2d 214, 218 (6th Cir. 1981).

The Court notes at this time that the record does not support counsel's request for payment of a 25% contingent fee from the value of the judgment. The retention agreements submitted by counsel, Doc. No. 45, Exs. 6 & 7, do not indicate any agreement to a 25% contingent fee by the class representatives. Instead, the agreement states only that "Our fees (payment for our time) must be approved by the Court and are dependent upon a recovery. You will have the opportunity to discuss any fee request to the Court and object to our request if you choose to do so." See id. § 7. The affidavits submitted by the class representatives, Mr. Dalesandro and Ms. Noonan, indicate that they agree that "Defendant should pay the full

amount of my attorney's fees and expenses up to 25% of the total value of the Class recovery." Dalesandro Aff. (Doc. No. 45, Ex. 6) ¶ 6; Noonan Aff. (Doc. No. 45) ¶ 6 (emphasis). While Mr. Dalesandro and Ms. Noonan acknowledge that they understand that attorney's fees could be paid out the Class recovery, see id. ¶ 8, there seems to be no acknowledgment or understanding on their part that the fee paid to counsel could amount to 25% of their recovery. Similarly, the notice to the class (Doc. No. 50) does not inform the class that a fee equaling 25% could be deducted from their benefit to pay for attorney's fees. The Court is, therefore, unwilling at this time to approve payment of a 25% contingent fee from the judgment without ensuring that the Class representatives have truly agreed to deduction of a 25% contingent fee. Additionally, the Court wants to ensure that the absent class members are on notice of the contingent fee arrangement and have an opportunity to object to that fee if they desire.

Accordingly, Plaintiffs' motion to approve payment of a 25% contingent fee is denied without prejudice to its renewal. Counsel may supplement the record in support of this request to address the concerns raised by the Court within twenty-one (21) days of the date of this order.

I. Expenses

Plaintiffs claim expenses in the amount of \$12,874.79. Based on the foregoing discussion and analysis of the appropriate award of attorney's fees to Plaintiffs, one could reasonably anticipate that International Paper would object to a substantial portion of Plaintiffs' claim for expenses. If that was the expectation, one would not be disappointed.

The principal area of dispute is Plaintiffs' claim for the expense of hiring a economic expert to calculate the value of the enhanced Flex Six retirement benefits for the twenty or so class members who qualify for that benefit under the terms of the severance plan. Under the terms of the severance plan, eligible employees who had attained age 49 at the time of termination, and whose age and years of service equaled at least 59, would have their retirement plan benefit enhanced by the most beneficial combination of an additional six years of age and/or years of service for early or normal retirement. See Plan at "Section 3 Pension Enhancement."²⁷

²⁷ The Flex Six provision states:

If an Eligible Employee has attained age 49 as of the date of Termination and the Eligible Employee's age plus years of service equal at least 59, the Eligible Employee's pension benefit from the Retirement Plan shall be enhanced by crediting the Eligible Employee with the most beneficial combination of an additional six (6) years of age and/or service credit under the Retirement Plan for early or normal retirement. As part of such enhanced benefit the Eligible Employee shall be entitled to post retirement death benefits, life insurance and medical plan coverage.

According to Plaintiffs, it was necessary to hire an expert to calculate the value of the enhanced retirement benefit for those participants because International Paper has taken the position that the affected participants are still employed by Smart Paper and, therefore, not eligible to receive early or normal retirement benefits from the retirement plan. The total cost of this analysis was \$5,275.00. It appears, however, that counsel hired this expert solely for the purpose of estimating a value of the total judgment so they then in turn could claim a percentage of the fund for their fees. The Court finds that this is not a reasonable expenditure to charge to International Paper. The class members derived no benefit from the hiring of this expert. Accordingly, the Court disallows this expense.

International Paper objects to the rate billed by Plaintiffs for photocopying, \$.15 per page as being excessive. Relying on Tinch v. City of Dayton, 199 F. Supp.2d 758, 770 (S.D. Ohio 2002), and 28 U.S.C. § 1920, International Paper argues that the standard rate for photocopying is \$.05 per page. Regrettably, even seemingly inconsequential matters, such as a 10 cent dispute over the reasonable rate to be paid for photocopying, is not allowed to escape the trial court's attention in assessing a fee petition. See Bowling v. Pfizer, Inc., 132 F.3d 1147, 1152 (6th Cir. 1998).

Unfortunately, Tinch does not purport to establish a standard rate for photocopying charges nor does the opinion in fact state that \$.05 per copy is the standard rate for photocopying. Rather, Chief Judge Rice stated only that plaintiffs had not carried their burden of establishing that \$.25 per copy was reasonable and that in his experience \$.05 per copy was the reasonable rate for copies. See Tinch, 119 F. Supp.2d at 769-70. To repeat, no standard was established in Tinch. On the other hand, the Court notes that, at least in a bankruptcy matter, a court held that \$.20 per copy was a reasonable rate. See In re Union Cartage Co., 56 B.R. 174, 178 (Bankr. N.D. Ohio 1986). Therefore, the Court finds that \$.15 per copy is a reasonable rate for copies. International Paper does, however, validly argue that Plaintiffs have not established that all of its copying expenses, totaling \$5,060.06, about 40% of the total expenses billed, were necessarily incurred. The problem again is insufficient or non-existent detail as to the reason for the charge. Accordingly, the Court deducts 25%, or \$1,265.02, from the photocopying expense for inadequate documentation. See Gradisher v. Check Enforcement Unit, Inc., No. 1:00-CV-401, 2003 WL 187416, at *8 (E.D. Mich. Jan. 22, 2003).

Plaintiffs' expert expense and photocopying expenses account for approximately 80% of the total expenses claimed. Although International Paper quibbles over some of the remaining

charges, such as long distance telephone charges, mileage, and postage expenses, as being inadequately documented as well, the amounts billed for these items are de minimis when compared to the whole. Upon review of the remaining expenses, the Court finds that they are reasonable. Accordingly, the Court will not take any further deductions from the expenses claimed.

In summary, the Court awards Plaintiffs expenses of \$6,334.77.

Conclusion

In conclusion, for the reasons stated, the Court awards Plaintiffs \$323,531.80 in attorney's fees and \$6,334.77 in costs.

IT IS SO ORDERED

Date July 8, 2005

s/Sandra S. Beckwith
Sandra S. Beckwith, Chief Judge
United States District Court